

FILED

OCT 15 2010

UNITED STATES BANKRUPTCY COURT
SAN FRANCISCO, CA.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 In re) Case No. 09-47577 RLE
11 MULTIPLE ALLIED SERVICES, INC.,) Chapter 7
12 dba MIRACLE AUTO PAINTING,)
13)
14 Debtor.)
15)

**MEMORANDUM RE KAYLAND OF SACRAMENTO, LLC'S MOTION TO FIX THE AMOUNT
OF ATTORNEYS' FEES AND COSTS DUE AS ADMINISTRATIVE RENT**

18 Landlord is entitled to an administrative claim for all legal
19 services performed from the petition date until the leasehold was
20 surrendered on January 22, 2010. The court determines the amount
21 of such fees to be \$28,066.

22 The lease was deemed rejected on December 17, 2009, when
23 Debtor failed to assume it within 120 days after the filing of the
24 petition. 11 U.S.C. § 365(d)(4).

25 Although section 365(d)(4) requires Debtor to surrender the
26 premises immediately upon rejection, Judge Jellen determined that
27 Debtor did not surrender the premises before it was ordered to do
28 so on January 22, 2010.

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1 Landlord and Trustee stipulated on March 4, 2010 that
2 Landlord's administrative claim included unpaid rent from the
3 petition date through date of actual surrender of the premises
4 (rather than the date of deemed rejection), and that "rent" for
5 such period included any contractual obligation to pay attorneys
6 fees (the Stipulation).

7 Trustee argues that, but for the Stipulation, Landlord could
8 recover only those fees incurred between the petition date and the
9 date of rejection. Cukierman v. Uecker (In re Cukierman), 265 F.3d
10 846, 852 (9th Cir. 2001).

11 Trustee seeks to be relieved of the Stipulation on three
12 grounds: mistake; lack of notice to creditors; and lack of
13 consideration. Mistake is not a sufficient basis to set aside the
14 Stipulation, because the mistake was neither mutual nor caused by
15 Landlord. The Stipulation stated very clearly that Landlord could
16 recover attorneys fees incurred through the date of surrender.
17 Lack of notice to creditors is not a sufficient basis to set aside
18 the Stipulation, because the court declines to permit Trustee to
19 attack his own act as ultra vires, especially where that act was
20 not a settlement of all issues, but merely a narrowing of issues
21 for a final hearing. Lack of consideration is also not a
22 sufficient basis to set aside the Stipulation. By narrowing the
23 issues to be resolved at a final hearing, the Stipulation provided
24 a benefit to the estate by reducing the estate's litigation costs.
25 At the same time, it is also far from clear that the Stipulation
26 gave away a valid defense to a claim for fees incurred between
27 rejection and surrender. Debtor's failure to surrender the
28 premises upon rejection violated Debtor's duties under section

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1 365(d)(4), which gave rise to an administrative claim for damages
2 caused by that violation. see In re Malden Mills Industries, Inc.,
3 303 B.R. 688 (1st Cir. BAP 2004); see also In re TSB, Inc., 302
4 B.R. 84 (Bankr. D. Idaho 2003).

5 The attorneys fees provision in the lease makes all fees
6 incurred by Landlord to enforce its rights under the lease payable
7 immediately as rent. The services performed from the petition date
8 though the date of surrender meet that criterion. The lease
9 provision does not limit the amount payable to reasonable fees
10 (although it also appears that the amounts sought are reasonable).
11 It thus appears that all attorneys fees incurred from the petition
12 date through the date of surrender constitute an allowable
13 administrative claim. See Cukierman, 265 F.3d at 852 (whether fees
14 recoverable as administrative expense depends upon whether those
15 fees are payable during administrative rent period under terms of
16 lease).

17 Under the bright-line test adopted by the Ninth Circuit in
18 Cukierman, fees incurred after the surrender date cannot be
19 accorded administrative expense priority, even if those fees relate
20 directly to the enforcement of pre-surrender lease obligations. In
21 Cukierman, the BAP had held that the landlord was entitled to fees
22 incurred post-rejection in enforcing its rights to pre-rejection
23 rent, but the court of appeals expressly rejected that approach and
24 reversed the award of fees incurred after surrender. Id.

25
26 Oct 15, 2010

27 Date



Hon. Thomas E. Carlson

28
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